313 U.S. 579

Office - Supreme Court, U.S.
FILED
APR 18 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

NO. 964

313 U.S. #2
MEL-MI

WILLIAM LARIMER MELLON and THOMAS MELLON, Executors of the Will of James R. Mellon, Deceased, Petitioners,

v.

WILLIAM DRISCOLL, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, BRIEF, AND APPENDIX.

WM. S. MOORHEAD,
WM. F. KNOX,
Attorneys for Petitioners.

1732 Oliver Building,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 208-212 GRANT STREET, PITTSBURGH, PA.

SUBJECT INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI

Matter Involved 1
Jurisdiction 4
Questions Presented 4
Reasons for Allowance of Writ 5
Prayer for Writ 7

BRIEF IN SUPPORT OF PETITION

Opinions Below 9
Statement of the Case 9
Specification of Errors 9
Summary of Argument 10
Argument 12
Section 302(d) of 1926 Act as Amended by 1934 Act 12
The Power Retained by Decedent did not Render the Transfers incomplete and subject to the Estate Tax 12
The 1940 Amendment to the Gift Tax Regulations 16
The decision of the Circuit Court of Appeals is in conflict with administrative interpretation and practice in assessing the Gift Tax and Estate Tax 19
The 1934 Amendment to the Revenue Act of 1926 should not be applied retrospectively to Transfers made Prior to its Enactment 22
Conclusion 25

(32493

PAGE

APPENDIX

Section 302(d) (1) and (2) of the Revenue Act of 1926, as amended by the Revenue Act of 1934 26

Article 3 of Regulations 79 Relating to Federal Gift Tax, as amended 27

TABLE OF CITATIONS.

Cases.

Corliss v. Bowers, 281 U. S. 376 18

Hassett v. Welch, 303 U. S. 303 .....7, 11, 23

Lyon et al. v. Alexander, 304 Pa. 288, 156 Atl. 84 ... 17

Rasquin v. Humphreys, 308 U. S. 54 14

Sanford v Commissioner, 308 U. S. 39 .....5, 14

Wilbur's Estate, 334 Pa. 45, 5 Atl. (2) 325 18

Statutes.

Revenue Act of 1926:

§ 302 (d) (44 Stat. 71) 12, 26

§ 302 (h) (44 Stat. 71) 23

Revenue Act of 1934:

§ 401 (48 Stat. 752) 12

Miscellaneous.

Article 3 of Regulations 79 relating to the Gift Tax, as amended 17, 27

Report of Ways and Means Committee of House on proposed Amendment to Section 302(d) of Revenue Act of 1926 by Revenue Act of 1934 ... 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

NO. .....

WILLIAM LARIMER MELLON and THOMAS MELLON, Executors of the Will of James R. Mellon, Deceased, Petitioners,

v.

WILLIAM DRISCOLL, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of WILLIAM LARIMER MELLON and THOMAS MELLON, Executors of the Will of JAMES R. MELLON, Deceased, respectfully shows:

Matter Involved.

This is an action at law, instituted in the District Court of the United States for the Western District of Pennsylvania by your petitioners, hereinafter also referred to as plaintiffs, against respondent, hereinafter referred to as defendant, for refund of additional fed-

eral estate taxes assessed by the Commissioner of Internal Revenue against the Estate of James R. Mellon, who died on October 20, 1934, leaving a will on which letters testamentary were issued to your petitioners (R. 2, 3).

The case was tried before District Judge McVicar, without a jury, and resulted in a judgment against the plaintiffs and in favor of the defendant (R. 2).

On appeal by plaintiffs to the Circuit Court of Appeals for the Third Circuit, this judgment was affirmed in an opinion by Circuit Judge Clark (R. 22, 28).

The amount of additional federal estate taxes, with interest, paid by plaintiffs, for which refund is sought, is $56,148.

The tax was assessed on the value, at the date of decedent's death, of property transferred by decedent on December 1, 1917, by two deeds of trust, and on minor additional transfers thereunder in 1932 and 1933, less the value of the life estates granted thereby (R. 5, 6).

The two deeds of trust were identical in all respects, except that one was made for the benefit of decedent's daughter and the other for the benefit of his son, both of whom are still living.

In the deed for the benefit of the daughter, Mrs. Grange (now Hasbrouck), decedent transferred securities to The Union Trust Company of Pittsburgh, as Trustee, in trust, to pay the income to her for life and upon her death to distribute the principal to such person or persons or corporation as she should by will direct, and in the absence of such direction, to such person or persons as would take the same as her heirs under the intestate laws of Pennsylvania. This deed contained the following provision (R. 19):

"The party of the first part hereby reserves the right after six months written notice of his intention so to do, served on the party of the second part [the Trustee], to revoke this trust, whereupon the principal of the trust fund shall be distributed to S. LUCILLE MELLON GRANGE [life beneficiary with general testamentary power of appointment over remainder] and the trust shall end."

The deed for the benefit of the son, Thomas Mellon, is identical, except that his name appears therein in the place of the name of S. Lucille Mellon Grange (R. 16-17).

The District Court found as facts that none of the property transferred by the decedent under the said deeds of trust was transferred in contemplation of death, that decedent never exercised the power reserved by him to terminate the trusteeship with the provision that the trust should thereupon end and the trust fund be distributed to the beneficiary, and that the decedent never gave the six months' written notice to the Trustee of his intention to end the trusteeship, which was required as a condition precedent to the right to end such trusteeship (R. 4, 5, 6).

These facts were not controverted by the Circuit Court of Appeals (R. 22).

Although plaintiffs contended that the reserved power was not a power to revoke, because decedent could not recapture the trust property, the District Court held that the remainder interests under the trusts were taxable under Section 302 (d) of the Revenue Act of 1926, as amended by the Revenue Act of 1934 (R. 7).

In affirming the judgment of the District Court, the Circuit Court of Appeals, in an opinion by Circuit Judge Clark, held that decedent had retained a power to revoke within the meaning of Section 302 (d) of the Revenue

Act of 1926, as amended by the Revenue Act of 1934 (R. 28).

Jurisdiction.

The Circuit Court of Appeals affirmed the judgment of the District Court February 3, 1941.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 § 1, 43 Stat. 938; U. S. C. A., Title 28, Section 347.

Questions Presented.

1. Where the donor of a trust has no power to change the beneficiaries or to recapture the trust property, but only a power to terminate the trusteeship, whereupon the property is to be distributed to the beneficiary, who has a life estate, with general testamentary power to appoint the remainder, should the value of such remainder interest be included in the donor's gross estate under Section 302 (d) of the Revenue Act of 1926, as amended by the Act of 1934?

2. Should the value of a transfer *inter vivos* be included in the transferor's gross estate under the provisions of the 1934 Amendment to Section 302 (d) of the Revenue Act of 1926, enacted subsequent to the transfer and not made applicable by its terms to prior transfers?

Reasons for Allowance of Writ.

I.

The decision of the Circuit Court of Appeals is a decision of a federal question probably in conflict with the rule established by this Court in the case of *Sanford v. Commissioner,* 308 U. S. 39, and with the Amended Regulations promulgated by the Commissioner of Internal Revenue putting that rule into administrative practice.

The *Sanford case* and the Amended Regulations prescribe the criteria for determining whether a transfer in trust with reserved powers is subject to the Gift Tax or the Estate Tax.

The fundamental question presented by the case at bar is whether a transfer in trust of the kind in suit is subject to the Gift Tax or to the Estate Tax. Its answer depends on whether or not the power reserved by the decedent renders the transfer incomplete.

The rule established by the *Sanford case* and the Amended Regulations is that a transfer of property upon trust, with power to revoke it and recapture the trust property or to modify its terms so as to designate new beneficiaries other than the donor, is incomplete; but that the reservation of power merely to change the manner or time of enjoyment of the transferred property does not render the transfer incomplete.

Decedent did not reserve the power to recapture the trust property or to designate new beneficiaries, but only a power to change the manner and time of enjoyment of the transferred property. The power reserved did not, therefore, render the transfer incomplete.

Both the *Sanford case* and the Amended Regulations are based on the axiom that where the power reserved does not render the transfer incomplete, the transfer is subject to the Gift Tax and not the Estate Tax.

The Circuit Court of Appeals, however, held that the transfer was subject to the Estate Tax.

The opinion of the Circuit Court of Appeals fails to mention this contention or to cite the *Sanford case* and the Amended Regulations, although they formed the basis of plaintiffs' principal argument in that Court.

II.

The decision of the Circuit Court of Appeals is in conflict with administrative interpretation and practice in assessing the Gift Tax and Estate Tax.

As applied to transfers *inter vivos*, these two taxes are *in pari materia* and mutually exclusive, except in the case of transfers in contemplation of death. The *Sanford case* enunciated a rule which brought clarity and consistency into the determination of which tax was applicable.

That rule has been carried into administrative practice by the promulgation of regulations and forms of return relating to the Gift Tax. That practice, now in effect and of nation-wide application, will be upset, if the decision in the case at bar is not reversed.

III.

The decision of the Circuit Court of Appeals is a decision of a federal question probably in conflict with the decision of this Court in the case of *Hassett v. Welch,* 303 U. S. 303, and with other applicable decisions of this Court.

In the *Welch case* this Court held that the 1931 Amendment to Section 302 (c) of the Revenue Act of 1926 should not be retroactively applied to a transfer made prior to its enactment, because the Amendment was not made retroactive by its terms.

The Circuit Court of Appeals in the case at bar retroactively applied the 1934 Amendment to Section 302 (d) of the Revenue Act of 1926 to transfers made prior to its enactment, although the Amendment was not made retroactive by its terms.

The opinion of the Circuit Court of Appeals fails to mention this contention or to cite the *Welch case,* although they formed the basis of one of plaintiffs' main arguments in that Court.

The position of your petitioners is further elaborated in a supporting brief submitted herewith.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue out of and under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the Record of all proceedings in said Circuit Court of Appeals, in the case entitled, "WILLIAM LARIMER MELLON and THOMAS MELLON, Executors of the Will of JAMES R. MELLON, Deceased, Plaintiffs-Appellants, v. WILLIAM DRISCOLL, Collector of Internal Revenue for the Twenty-

third District of Pennsylvania, Defendant-Appellee, No. 7438", to the end that said case may be reviewed and determined by this Court, that the judgment of the Circuit Court of Appeals for the Third Circuit may be reversed by this Court, and that your petitioners may have such other and further relief as to this Court may seem proper.

WILLIAM LARIMER MELLON and THOMAS MELLON, Executors of the Will of JAMES R. MELLON, Deceased.

.....

By WM. S. MOORHEAD,

.....

WM. F. KNOX,
Their Attorneys.